

This document contains the consolidated text resulting from the 30th round of negotiations (6-10 November 2017) on government procurement in the Trade Part of the EU-Mercosur Association Agreement. This is without prejudice to the final outcome of negotiations. Both sides reserve the right to make subsequent modifications to their proposals.

WORKING DOCUMENT
(EU PLUS MERCOSUR NEW PROPOSALS
Updated following the XXX BNC November 2017)

CHAPTER ON GOVERNMENT PROCUREMENT

(Note: In this document, text elements where the Parties have found that their respective positions converge to a wide extent have been presented as a single text, and divergent proposals have been put in brackets. By contrast, where the Parties have found considerable differences between their respective proposals they have found it preferable to put them side by side. With regard to the spaces left empty in the tables, the Parties will either submit alternative drafting proposals or manifest whether, and under which circumstances, they could accept the other Party's drafting.

*The chapter will be reviewed with regard to the use of the term "Party/Parties".
The chapter will be reviewed with regard to the use of the terms "Appendix" and "Annex").*

Article 1
Introduction

1. The Parties recognise the contribution of transparent, competitive and open tendering to economic development and set as their objective the effective opening of their respective procurement markets.

Article 1bis
Definitions

[EU:

1. For the purposes of this Chapter:

EU:

- a. **commercial goods or services** means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;
- b. **construction service** means a service that has as its objective the realization by whatever means of civil or building

works, based on Division 51 of the United Nations Provisional Central Product Classification (CPC);

- c. **days** means calendar days;
- d. **electronic auction** means an interactive process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;
- e. **in writing** or **written** means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information;
- f. **limited tendering** means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;
- g. **measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- h. **multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;
- h.bis. **negotiation** means a way to conduct the procurement procedure limited to specific situations whereby contracting authorities are allowed to negotiate with tenderers, when certain conditions are met; the principles of transparency and non-discrimination apply throughout the conduct of the negotiations.
- i. **notice of intended procurement** means a notice published by a procuring entity

inviting interested suppliers to submit a request for participation, a tender, or both;

j. open tendering means a procurement method whereby all interested suppliers may submit a tender;

k. person means a natural person or a juridical person;

l. procuring entity means an entity covered under a Party's Annexes (..) under Appendix I;

m. qualified supplier means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;

n. selective tendering means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;

o. services include construction services, unless otherwise specified;

p. standard means a document approved by a recognized body that provides for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, service, process or production method;

q. supplier means a person or persons that provide or could provide goods or services; and

r. technical specification means a tendering requirement that:

i. lays down the characteristics

[MERCOSUR:

k.

i. natural person means a national or permanent resident of MERCOSUR or one of the Member States of the European Union according to their respective legislation;

ii. juridical person means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or

- ii. addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

s. **offsets** means measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.

Article 2 Scope and Coverage

1. This Chapter applies to covered procurement for governmental purposes:
 - a. of goods, services, or any combination thereof:
 - a.i. as specified in each Party's annexes to Appendix I; and
 - a.ii. not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
 - b. by any contractual means, including: purchase, lease, and rental or hire purchase, with or without an option to buy;
 - c. for which the value equals or exceeds the relevant threshold specified in each Party's Annexes to Appendix I, at the time of publication of a notice in accordance with Article [EU: 11] [MERCOSUR: 12];
 - d. by a procuring entity as specified in each Party's annexes; and
 - e. that is not otherwise excluded from coverage.
2. Except where provided, this Chapter does not apply to:
 - a. the acquisition or rental of land, buildings or other immovable property or the rights thereon;
 - b. Non-contractual agreements or any form of assistance that a Party provides, including

cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives, government provision of goods and services to state, regional, or local government entities;

- c. the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- d. public employment contracts;
- e. procurement conducted:
 - e.i. for the specific purpose of providing international assistance, including development aid;
 - e.ii. under the particular procedure or condition of an international agreement relating to the stationing of troops
 - e.iii. under the particular procedure or condition of an international agreement relating to the joint implementation by the signatory countries of a project;
 - e.iv. under the particular procedure or condition of a international organisation, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

[MERCOSUR:

- f. Public procurement undertaken among public entities, whether they are included or not in Annex (X), as long as the object of the contract is not subcontracted to a third person that is not a public entity.
- g. public procurement made outside the territory of a party, for consumption outside the territory of that party;
- h. public concessions.]

3. Each Party shall specify the following information in its annexes to Appendix I:

- a. In Annex 1, the central government entities whose procurement is covered by this Chapter;
- b. In Annex 2, the sub-central government entities whose procurement is covered by this Chapter;

- c. In Annex 3, all other entities whose procurement is covered by this Chapter;
- d. In Annex 4, the goods covered by this Chapter;
- e. In Annex 5, the services, other than construction services, covered by this Chapter;
- f. In Annex 6, the construction services covered by this Chapter;
- g. In Annex 7, any General Notes.

4. Where a procuring entity, in the context of covered procurement, requires persons not covered under a Party's Annexes to Appendix I to procure on its behalf, Article 5 shall apply *mutatis mutandis*.

Article 3 **Valuation of Contracts**

1. In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall
 - a. neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement; and
 - b. include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
 - b.i. premiums, fees, commissions, and interest; and
 - b.ii. where the procurement provides for the possibility of options, the total value of such options.
2. Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts (hereafter referred to as "recurring procurements"), the calculation of the estimated maximum total value shall be based on:
 - a. the value of recurring procurements of the same type of good or service awarded during the preceding 12 months or the procuring entity's preceding fiscal year, adjusted where possible to take into account anticipated changes in the quantity or value of the good or service being procured over the subsequent 12 months; or
 - b. the estimated value of recurring procurements of the same type of good or service to be awarded during the 12 months subsequent to the initial contract award or the procuring entity's fiscal year.
3. In the case of procurement by lease, rental, or hire purchase of goods or services, or

procurement for which a total price is not specified, the basis for valuation shall be:

- a. in the case of a fixed-term contract:
 - a.i. where the term of the contract is 12 months or less, the total estimated maximum value for its duration, or
 - a.ii. where the term of the contract exceeds 12 months, the total estimated maximum value, including any estimated residual value;
- b. where the contract is for an indefinite period, the estimated monthly instalment multiplied by 48; and
- c. where it is not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

Article 4 General Exceptions

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition defence products or war materials, or to procurement indispensable for national security or for national defence purposes.
2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail, or a disguised restriction of trade between the Parties, nothing in the Chapter shall be construed to prevent any Party from adopting or maintaining measures:
 - a. relating to goods or services of handicapped persons, of philanthropic institutions or of prison labour,
 - b. necessary to protect public morals, order, or safety;
 - c. necessary to protect human, animal, or plant life or health including environmental measures, or
 - d. necessary to protect intellectual property.

Article 5 General Principles

1. With respect to any measure related to covered procurement:
 - (a) the EU Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the signatory Mercosur countries and to the suppliers of the signatory Mercosur countries offering such goods and services, treatment no

less favourable than the treatment accorded to its own goods, services and suppliers;

(b) each signatory Mercosur country, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the EU Party and to the suppliers of the EU Party offering such goods and services, treatment no less favourable than the treatment accorded to its own goods, services and suppliers.

[EU:

2. With respect to any measure concerning covered procurement, the EU and each Mercosur State, including their respective procuring entities, shall not:

[MERCOSUR: *will make proposal.*

MERCOSUR will ensure market access to suppliers and providers from the EU through preferences in relation to third countries or through the principle of national treatment.

a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to, or ownership by, juridical or natural persons of the other Party; nor

b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

2 bis. Any EU Party supplier or service provider established in a MERCOSUR country shall be accorded in all other MERCOSUR countries treatment no less favourable than the treatment the latter accord to their own suppliers or service providers with respect to any measure regarding a covered procurement.

Any supplier or service provider from a MERCOSUR country established in one EU Member State shall be accorded in all other EU Member States treatment no less favourable than the treatment the latter accord to their own suppliers or service providers with respect to any measure regarding a covered procurement.

2 ter. The Parties apply no local establishment requirement to any supplier from the other Party wishing to participate in a tender.

3. The EU and each Mercosur State shall ensure that the suppliers of the other Party that have established a commercial presence in its respective territory through the constitution, acquisition or maintenance of a juridical person are accorded national treatment with regard to any government procurement of the Party in its territory. This obligation applies irrespectively of whether or not the procurement is covered by the Parties' annexes to this Agreement. However, the general exceptions set forth in Article 4 shall be applied.]

4. The provisions of this article do not apply to custom duties or any other measure of an equivalent nature, which have an impact on foreign trade, or to other import regulations and measures which affect the trade in services, different to the ones which specifically regulate public procurement covered under this agreement.

[Mercosur: 5. This article does not apply to Paraguay.]

Article 6

Use of electronic means

1. The Parties shall conduct covered procurement by electronic means to the widest extent possible and shall cooperate in developing and expanding the use of electronic means in government procurement systems.
2. If a procuring entity conducts a covered procurement by electronic means, it shall:
 - a. ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and
 - b. maintain mechanisms that endure the integrity of requests for participation and tenders, including establishment of the time and receipt and the prevention of inappropriate access.

Article 7
Conduct of procurement

A procuring entity shall conduct covered procurement in a transparent and impartial manner that avoids conflicts of interest and prevents corruptive practices and that is consistent with this Chapter, using the following methods: open tendering, selective tendering or limited tendering. Additionally, the Parties shall establish or maintain sanctions against such corruptive practices according to their domestic legislation.

Article 8
Rules of origin

For the purpose of Article 5 - General Principles, determination of the origin of goods shall be made on a non-preferential basis.

[MERCOSUR: Article 9
Denial of Benefits

Mercosur:

Under previous notification, a Party may deny the benefits of this chapter, to a service supplier of the other Party if such supplier:

- a) is a Juridical person of the other party not engaged in substantial business operation in the territory of that other Party; or
- b) is a person that supplies the service from the territory of a non-Party.

EU:

Under previous notification, a Party may deny the benefits of this chapter, to a service supplier of the other Party if it establishes that such supplier:

- a) is a Juridical person of the other party not engaged in substantial business operation in the territory of that other Party;
2. The denying party shall notify the other party before denying the benefit and shall consult with the other party at the request of that other party.

Article [EU: 9] [MERCOSUR: 10]

Offsets

[EU: With regard to covered procurement, a Party shall not seek, take account of, impose or enforce offsets.]

[MERCOSUR: Member States of MERCOSUR may, in the qualification and selection of suppliers, goods or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.]

Article [EU: 10] [MERCOSUR: 11] Publication of procurement information

1. Each Party shall:
 - a. promptly publish any law, regulation, judicial decision or administrative ruling of general application, standard contract clauses that are mandated by a law or regulation and incorporated by reference in notices and tender documentation and procedure regarding covered procurement, and any modifications thereof, in officially designated electronic or paper media that are widely disseminated and remain readily accessible to the public;
 - b. provide, if so requested by any Party, further information concerning the application of such provisions;
 - c. list in Appendix II, the electronic or paper media in which the Party publishes the information described in paragraph a;
 - d. list in Appendix III, the electronic media, if and where they exist, in which the Party publishes the notices required by Articles [11/12: *Publication of notices*], [13/14: *Qualification of suppliers/procurement methods*] paragraph 4, and [21 paragraph 2: *Transparency of procurement information*].
2. Each Party shall promptly notify the other Party of any modification to the Party's information listed in Appendix II and III.

Article [EU: 11] [MERCOSUR: 12] Publication of Notices

Notice of intended procurement

1. For each covered procurement, except in the circumstances described in Article 18 - *Limited Tendering*, a procuring entity shall publish a notice of intended procurement, which shall be directly accessible by electronic means free of charge through a single point of access, for the EU at EU level and for Mercosur countries at national level or at the regional level when it will exist. The notice of intended procurement shall remain readily accessible to the public, at least, until expiration of the time period indicated in the notice. The electronic medium shall be listed by each party in Appendix III. Each such notice shall include the information set out in Appendix IV.

Summary Notice

2. For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in [MERCOSUR: one language that is common to the EU and Mercosur, or] [EU: and] in one of the WTO languages. Each such notice shall include the information set out in Appendix V.

Notice of Planned Procurement

3. Procuring entities are encouraged to publish in the appropriate paper or electronic medium listed in Appendix III as early as possible in each fiscal year a notice regarding their future procurement plans. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.
4. A procuring entity in Annex 2 or 3 may use a notice of planned procurement as a notice of intended procurement provided that it includes as much of the information in Appendix IV as is available and a statement that interested suppliers should express their interest in the procurement to the entity. [MERCOSUR: and a statement that it constitutes a notice of intended procurement].

**Article [EU: 12] [MERCOSUR: 13]
Conditions for Participation**

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.
2. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall evaluate the financial, commercial and technical abilities of a supplier on the basis of that supplier's business activities inside and outside the territory of the Party of the procuring entity. It may require a supplier to demonstrate a relevant prior experience. However, it may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party or that the supplier has prior work experience in the territory of a given Party.
3. In making this assessment, the procuring entity shall base its evaluation on the conditions that it has specified in advance in notices or tender documentation.
4. A procuring entity may exclude a supplier on the following grounds:
 - a. bankruptcy,
 - b. false declarations,
 - c. significant deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts,
 - d. final judgments in respect of crime or serious public offences,
 - e. other sanctions that disqualify him to contract with entities of the Parties
 - f. grave professional misconduct, which renders the suppliers' integrity questionable,or

- g. failure to pay taxes.
5. The dispositions in paragraphs 1 and 2 shall be fulfilled by the suppliers of the Parties through the presentation of the documentation required by the tender or through equivalent documentation.

Article [EU: 13] [MCS: 14]
[EU: Qualification or Registration of Suppliers]
[MERCOSUR: Procurement Methods and other Provisions]

Selective tendering

1. Where a procuring entity intends to use selective tendering, the entity shall:
 - a. include in the notice of intended procurement at least the information specified in Appendix IV (a), (b), (c), (i), (k) and (l) and invite suppliers to submit a request for participation; and
 - b. provide by the commencement of the time-period for tendering, at least the information specified in Appendix IV (d), (e), (f), (g) and (h) to the qualified or registered suppliers.
2. A procuring entity shall recognise as qualified suppliers any domestic suppliers and any suppliers of the other Party that meets the conditions for participation in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.
3. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 1, a procuring entity shall ensure that those documents are made available at the same time to all qualified suppliers selected in accordance with paragraph 2.

Multi-Use Lists

4. If a Party in its internal legislation provides for the possibility for procuring entities to maintain a multi-use list of suppliers, such legislation shall ensure that a notice inviting interested suppliers to apply for inclusion on the list is:
 - a. published annually; and
 - b. where published by electronic means, made available continuously,in the appropriate medium listed in Appendix III. Such a notice shall include the information set out in Appendix VI.
5. Notwithstanding paragraph 4, where a multi-use list will be valid for three years or less, a procuring entity may publish the notice referred to in paragraph 4 only once, at the beginning of the period of validity of the list, provided that the notice:

- a. states the period of validity and that further notices will not be published; and
 - b. is published by electronic means and is made available continuously during the period of its validity.
6. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.
 7. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents relating thereto, within the time-period provided for in Appendix VII, a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time-period allowed for the submission of tenders.

Annexes 2 and 3 Entities

8. A procuring entity listed in Annex 2 or 3 may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:
 - a. the notice is published in accordance with paragraph 4 and includes the information in appendix VI, as much of the information in Appendix IV as is available, and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list; and
 - b. the entity promptly provides to suppliers that have expressed an interest to the entity in a given procurement, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in Appendix IV, to the extent such information is available.
9. A supplier having applied for inclusion on a multi-use list in accordance with paragraph 6 may be allowed by a procuring entity covered under Annex 2 and 3 to tender in a given procurement, where there is sufficient time for the procuring entity to examine whether it satisfies the conditions for participation

Information on Procuring Entity Decisions

10. A procuring entity shall promptly inform any supplier that submits a request for participation or application for inclusion on a multi-use list of the procuring entity's decision with respect to the request.
11. Where a procuring entity rejects a supplier's request for participation or application for inclusion on a multi-use list, ceases to recognize a supplier as qualified, or removes a supplier from a multi-use list, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

Article [EU: 14] [MERCOSUR: 15]**Technical Specifications**

1. A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of limiting competition, creating unnecessary obstacles to international trade, or discriminating between suppliers.
2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:
 - a. set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and
 - b. base the technical specifications on international standards, where these exist; otherwise, on national technical regulations, recognized national standards or building codes; each reference shall be accompanied by the words 'or equivalent'.
3. Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including such words as "or equivalent" in the tender documentation.
4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as "or equivalent" in the tender documentation.
5. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation of adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.
6. For greater certainty, this Article is not intended to preclude a procuring entity from preparing, adopting, or applying technical specifications to promote the conservation of natural resources or protect the environment.

Article [EU: 15] [MERCOSUR: 16]**Tender Documentation**

1. A procuring entity shall provide to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of the following issues:
 - a. the procurement, including the nature and quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specification, conformity assessment certification, plans,

drawings or instructional materials;

- b. any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection therewith;
 - c. all evaluation criteria to be considered in the awarding of the contract, and, except where the price is the sole criterion, the relative importance of such criteria;
 - d. where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other equipment related to the receipt of information by electronic means;
 - e. where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;
 - f. where there will be a public opening of tenders, the date, time and place for the opening and, where appropriate, the persons authorised to be present;
 - g. any other terms of conditions, including terms of payment and any limitation on the means by which tenders may be submitted, e.g., paper or electronic means; and
 - h. any dates for the delivery of goods or the supply of services.
2. In establishing in the tender documentation any delivery date for the goods or services being procured, a procuring entity shall take into account such factors as the complexity of the procurement; the extent of subcontracting anticipated—and the realistic time required for production, de-stocking and transport of goods from the point of supply or for supply of services.
3. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit environmental characteristics, and terms of delivery.
4. A procuring entity shall promptly provide, on request, the tender documentation to any supplier participating in the procurement; and reply to any reasonable request for relevant information by a supplier participating in the procurement, provided that such information does not give that supplier an advantage over its competitors in the procurement and that the request was presented within the corresponding time limits.
5. Where, prior to the assessment of tenders under Article 20, a procuring entity modifies or amends the criteria or requirements set out in the notice of intended procurement or tender documentation provided to participating suppliers, it shall transmit in writing all such modifications:
- a. to all suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and

- b. in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.
6. Procuring entities may require bidders to provide guarantees for maintaining the offer, and the successful bidder to provide a guarantee for the execution.

Article [EU: 16] [MERCOSUR: 17]**Time Periods**

A procuring entity shall, consistent with its own needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as the nature and complexity of the procurement, the extent of subcontracting anticipated, and the time for transmitting tenders from foreign as well as domestic points where electronic means are not used. Such time-periods, including any extension of the time-periods, shall be the same for all interested or participating suppliers. The applicable time periods are set out in [EU: Appendix VII].

Article 17**Negotiations**

1. If a Party, in its internal legislation, provides for the possibility for procuring entities to conduct procurement through negotiations, the procuring entities may use it in the following cases:
 - a. in the context of procurements in which they have indicated such intent in the notice of intended procurement; or
 - b. where it appears from the evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.
2. A procuring entity shall:
 - a. ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notices or tender documentation; and
 - b. where negotiations are concluded, provide a common deadline for the remaining suppliers to submit any new or revised tenders.

Article 18**Limited Tendering**

1. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, a procuring entity may award contracts by limited tendering, in the following circumstances:
 - (a) where

- i) no tenders were submitted, or no suppliers requested participation;
 - ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
 - iii) no suppliers satisfied the conditions for participation; or
 - iv) the tenders submitted have been collusive
- provided that the requirements of the tender documentation are not substantially modified;
- (b) where, for works of art, or for reasons connected with the protection of exclusive intellectual property rights, such as patents or copyrights, or proprietary information, or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
 - (c) for additional deliveries by the original supplier of goods and services that were not included in the initial procurement where a change of supplier for such additional goods or services:
 - i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
 - ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
 - (d) for goods purchased on a commodity market;
 - (e) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development. When such contracts have been fulfilled, subsequent procurements of goods or services shall be subject to this Chapter;
 - (f) in so far as is strictly necessary where, for reasons of urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time by means of an open tendering procedure or selective tendering
 - (g) where a contract is awarded to a winner of a design contest provided that the contest has been organised in a manner that is consistent with the principles of this Chapter, and the participants are judged by an independent jury with a view to a design contract being awarded to a winner;
 - (h) purchases made under exceptionally advantageous conditions that only arise in the very short term, such as unusual disposals by companies that normally are not suppliers, or disposals of assets of businesses in liquidation or receivership.

2. A procuring entity shall maintain records or prepare written reports providing specific justification for any contract awarded under paragraph 1.

Article 19 **Electronic Auctions**

Where a procuring entity intends to conduct a covered procurement using an electronic auction, the entity shall provide each participant, before commencing the electronic auction, with:

- a. the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;
- b. the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and
- c. any other relevant information relating to the conduct of the auction.

Article 20 **Treatment of Tenders and Award of Contracts**

1. A procuring entity shall receive, open and treat all tender under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2. A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
3. To be considered for an award, a tender shall be in writing and shall, at the time of opening, comply with the essential requirements set out in the tender documentation and, where applicable, in the notices and be from a supplier that satisfies the conditions for participation.
4. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted the most advantageous tender or where price is the sole criterion, the lowest price.
5. Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.
6. A procuring entity shall not use options, cancel a procurement, or modify awarded contracts in a manner that circumvents the obligations under this Chapter.

7. Parties may provide that if, for reasons imputable to the awarded supplier, the contract is not concluded within a reasonable time, or the awarded supplier does not fulfil the guarantee or does not comply with the contract terms, the contract may be awarded to the next tenderer and so forth.

Article 21

Transparency of Procurement Information

1. A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions and, on request, shall do so in writing. Subject to paragraphs 2 and 3 of Article 22, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.
2. After the award of each contract covered by this Chapter, a procuring entity shall as early as possible according to the time limits established in each Party's legislation, publish a notice in the appropriate paper or electronic media listed in Appendix III. Where only an electronic medium is used, the information shall remain readily available for a reasonable period of time. The notice shall include at least the following information:
 - a. a description of the goods or services procured which may include the nature and the quantity of the goods procured and the nature and the extent of the services procured;
 - b. the name and address of the procuring entity;
 - c. the name of the successful supplier;
 - d. the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
 - e. the date of the award; and
 - f. the type of procurement method used, and in cases limited tendering was used a description of the circumstances justifying the use of limited tendering.]
3. Each party agrees to communicate to other Party the available and comparable statistical data relevant to the procurement covered by this Chapter.

Article 22

Disclosure of Information

1. On request of the other Party each Party will promptly provide all relevant information about the adjudication of a covered procurement, in order to determine if the procurement was made in accordance with the rules of this Chapter. In cases where release of this information would prejudice competition in future tenders, the Party that receives that information shall not disclose it to any supplier, except after consultation with, and agreement of, the Party that

provided the information.

2. Notwithstanding any other provision of this Chapter, a Party, including its procuring entities, shall not provide to any supplier information that might prejudice fair competition between suppliers.
3. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, authorities and review bodies, to disclose confidential information where disclosure would impede law enforcement; might prejudice fair competition between suppliers; would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or would otherwise be contrary to the public interest.

Article 23 **Domestic Review Procedures**

1. Each Party shall establish or maintain timely, effective, transparent and non-discriminatory administrative or judicial review procedures through which a supplier may present a challenge with respect to the obligations under this Chapter of a Party and its entities that may arise in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.
2. Each Party may foresee in its domestic legislation, that in the event of a complaint by a supplier arising in the context of covered procurement, the Party concerned shall encourage its procuring entity and the supplier to seek resolution of the complaint through consultation. The procuring entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or right to seek corrective measures under the administrative or judicial review procedure.
3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.
4. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.
5. Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge. A review body that is not a court shall either be subject to judicial review or have procedural guarantees that provide for:
 - a. the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
 - b. the participants to the proceedings (hereinafter referred to as "participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;

- c. the participants shall have the right to be represented and accompanied;
 - d. the participants shall have access to all proceedings; and
 - e. the participants shall, have the right to request that the proceedings take place in public and that witnesses may be presented; and
 - f. decisions or recommendations relating to challenges by suppliers shall be provided, within a reasonable time, in writing, with an explanation of the basis for each decision or recommendation.
6. Both Parties shall adopt or maintain procedures that provide for:
- a. rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and
 - b. corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both, if a review body determines that there has been a breach or a failure as referred to in paragraph 1.

Article 24

Modifications and Rectifications of Coverage

1. A Party may modify or rectify its Annexes to this Chapter.

Modifications

2. When a Party intends to modify an Annex to this Chapter, the Party shall:
- a. notify the other Party in writing; and
 - b. include in the notification a proposal for appropriate compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification.
3. Notwithstanding subparagraph 2(b), a Party does not need to provide compensatory adjustments if the modification covers an entity over which the Party has effectively eliminated its control or influence.
4. If the other Party disputes that:
- a. an adjustment proposed under sub-paragraph 2 (b) is adequate to maintain a comparable level of mutually agreed coverage;

- b. the modification covers an entity over which the Party has effectively eliminated its control or influence under sub-paragraph 3 it must object in writing within 45 days of receipt of the notification referred to in sub-paragraph 2 (a) or be deemed to have accepted the adjustment or modification, including for the purposes of Chapter (Dispute Settlement).

Rectifications

- 5. The following changes to a Party's Annexes shall be considered a rectification of a purely formal nature, provided that they do not affect the mutually agreed coverage provided for in the Chapter:

- a. a change in the name of an entity;
- b. a merger of two or more entities listed within an Annex; and
- c. the separation of an entity listed in an Annex into two or more entities that are all added to the entities listed in the same Annex.

The party making such rectification of a purely formal nature shall not be obliged to provide for compensatory adjustments.

- 6. In the case of proposed rectifications to a Party's Annexes, the Party shall notify the other Party every two years following the entry into force of this Chapter.
- 7. A Party may notify the other Party of an objection to a proposed rectification within 45 days from having received the notification. Where a Party submits an objection, it shall set out the reasons why it believes the proposed rectification is not a change provided for in paragraph 5 of this Article, and describe the effect of the proposed rectification on the mutually agreed coverage provided for in the Agreement. If no such objection is submitted in writing within 45 days after having received the notification, the Party shall be deemed to have agreed to the proposed rectification.

Consultations and Dispute resolution

- 8. If the other party objects to the proposed modification or rectification, the Parties will seek to resolve the issue through consultations. If no agreement is found within [x] days of receipt of the objection, the Party seeking to modify or rectify its Annex may refer the matter to the Dispute Settlement procedure under this Agreement. The intended modification or rectification of the Annex will take effect only when both Parties have agreed or on the basis of a final decision of the [Dispute Settlement body].

Article 25**Government Procurement Sub-Committee**

- 1. The Parties shall establish a Sub-Committee on Government Procurement (hereinafter referred to as "Sub-Committee", comprised of representatives of the Parties.
- 2. The Sub-Committee shall meet annually or upon request of a Party, to:
 - a. review the effective operation of this Chapter, the mutual opening of procurement markets;

- b. exchange information relating to the government procurement opportunities in each Party including exchanges on procurement statistical data; and
- c. discuss any other matters related to the satisfactory operation of this Chapter.

Article 26

[EU: Transitional measures] [MERCOSUR: Special and differential treatment]

[EU: Taking in account the development, financial and trade needs, MERCOSUR countries will benefit from transitional measures, which they may need before giving full access to its procurement market.

The content and duration of the transitional measures will be subject of negotiation between the Parties and be listed under Annex [X] to Appendix I. In the EU's view, possible transitional measures benefiting to MERCOSUR countries cannot depart from the measures listed under Article V of the revised text of the WTO agreement on government procurement (GPA).]

[MERCOSUR: In view of different development of MERCOSUR economies on one hand, and the European Union on the other hand, and of the fundamental role that government procurement has in development policies, the parties agree that this chapter should be based on special and differential treatment in favour of MERCOSUR. This special and differential treatment shall be used to preserve and promote economic development and shall be apparent in the different aspects detailed as Annex XX”

Annex XX- Special and differential treatment elements

1. Threshold: MERCOSUR may establish differential thresholds in each case of MERCOSUR states, which, in all cases, will be higher than the European Union thresholds.
2. Coverage:
 - a. Entities: The lists of entities offered by EU will include entities of community level, federal/central, department/province and local. MERCOSUR will only include federal level entities.
 - b. Goods and services: Member States of MERCOSUR may exclude goods and services, as well as programs or government policies, which they consider necessary to secure the fulfilment of their public policy compliance.
3. Offsets: Member States of MERCOSUR may adopt measures such as, domestic

- content, local providers, licensing of technology, investment requirements, counter-trade or similar requirements.
4. Duration of special and differential treatment: The provisions of special and differential treatment will be in effect for an indefinite period. These provisions may be reviewed in the context of a future revision of this agreement. In such opportunity the impact of this Chapter on the public acquisition markets of both parties should be taken properly into consideration.]

Article 27

Cooperation in Public procurement

[**MERCOSUR:** Cooperation between the Parties in this field shall seek to enable MERCOSUR countries to implement the necessary reforms for the effective implementation of this chapter.

In particular, Cooperation activities in this area shall primarily be carried out by means of:

- i) Exchange of information, good practices, statistical data, experts, experiences and policies in areas of mutual interest;
- ii) Exchange of good practices regarding the use of sustainable procurement practices and other areas of mutual interest;
- iii) Promoting networks, seminars and workshops in topics of mutual interest;
- iv) Transfer of know-how, technical assistance, capacity building, training activities inter alia from EU to MERCOSUR to support MERCOSUR institutions in the implementation of this chapter;

- v) Training, capacity building, transfer of knowledge and expertise, technical assistance, inter alia, from EU to public officials of each MERCOSUR country to ensure compliance with the provisions of this chapter;
- vi) Training, sharing of information and technical assistance from EU to MERCOSUR suppliers, specially to small and medium size enterprises, regarding access to public procurement markets.]

[EU: Parties recognize the shared interest in cooperation that contributes to the implementation of this Chapter and agree to make the most of it with the aim of optimizing results, expanding opportunities and obtaining the greatest benefits for the Parties.

1. In particular, Cooperation activities in this area shall primarily be carried out by means of:

- i) Exchange of information, good practices, statistical data, experiences and policies in areas of mutual interest, including through networks, seminars and workshops;
- ii) Exchange of good practices regarding the use of sustainable procurement practices and other areas of mutual interest;
- iii) Exchange and sharing of information, with a view to improving access to the public procurement markets of each other Parties, in particular for small and medium size enterprises.

2. The Sub-committee referred to in Article 25 shall discuss the extent and the means of such cooperation including the use of existing instruments, resources and

Limited

November 9, 2017

mechanisms available to the Parties.]

Limited

APPENDIX I

Annex 1

Central Government Entities whose Procurement is covered by this Chapter

Annex 2

Sub central Government Entities whose Procurement is covered by this Chapter

Annex 3

All other Entities whose Procurement is covered by this Chapter

Annex 4

Goods covered by this Chapter]

Annex 5

Services, other than construction services, covered by this Chapter

Annex 6

Construction services covered by this Chapter

Annex 7

General Notes

**[MCS: *Annex 8*
Transitional measures]**

APPENDIX II

Media for Publication of Procurement Information

APPENDIX III

Media for Publication of Notices

APPENDIX IV

Notice of Intended Procurement

Each notice of intended procurement shall include:

- a. the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;

- b. a description of the procurement, including the nature and quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
- c. the procurement method that will be used and whether it will involve negotiation or electronic auction;
- d. the address and final date for the submission of tenders;
- e. the language or languages in which tenders or requests for participation may/must be submitted, if other than an official language of the Party of the procuring entity;
- f. for recurring contracts, if possible, an estimate of the timing of subsequent notices of intended procurement;
- g. a description of any options;
- h. the time-frame for delivery of goods or services or the duration of the contract;
- i. where applicable, the address and any final date for the submission of requests for participation in the procurement;
- j. a list and brief description of any conditions for participation of suppliers;
- k. where, pursuant to Article 7, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender.

APPENDIX V

Summary notice

Each summary notice shall include:

- a. the subject-matter of the procurement;
- b. the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and
- c. the address from which documents relating to the procurement may be requested.

APPENDIX VI

Notice Inviting Interested Suppliers to Apply for Inclusion in a multi-use list

Each notice inviting interested suppliers to apply for inclusion in a multi use list shall include:

- (a) a description of the goods or services, or categories thereof, for which the list may be used;
- (b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity will use to verify that a supplier satisfies the conditions;
- (c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;
- (d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
- (e) an indication that the list may be used for procurement covered by this Agreement.

APPENDIX VII

Time Periods

Deadline for the submission of request for application in case of selective tendering

1. A procuring entity that uses selective tendering shall establish that the final date for the submission of requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

Deadlines for the submission of tenders

2. Except as provided for in paragraphs 3, 4 and 6, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

- (a) in the case of open tendering, the notice of intended procurement is published; or
- (b) in the case of selective tendering, the entity notifies suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

Cases for the reduction of the time period for tendering (open and selective)

3. A procuring entity may reduce the time-period for tendering set out in paragraph 2 to not less than 10 days where:

- (a) the procuring entity published a notice of planned procurement under Article 11/12: *Publication of notices*] paragraph 3 at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
 - (i) a description of the procurement;
 - (ii) the approximate final dates for the submission of tenders or requests for participation;
 - (iii) the address from which documents relating to the procurement may be obtained; and
 - (iv) as much of the information that is required under Appendix IV for the notice of intended procurement, as is available;
- (b) the procuring entity, for procurements of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time periods for tendering based on this paragraph; or
- (c) a state of urgency duly substantiated by the procuring entity renders the time-period for tendering established in accordance with paragraph 2 impracticable.

4. A procuring entity may reduce the time-period for tendering set out in paragraph 2 by five days for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;
- (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the tenders can be received by electronic means by the procuring entity.

5. The use of paragraph 4, in conjunction with paragraph 3, shall in no case result in the reduction of the time-period for tendering set out in paragraph 2 to less than 10 days from the date on which the notice of intended procurement is published.

6. Notwithstanding any other provision in this Article, where a procuring entity purchases commercial goods or services, or any combination thereof, it may reduce the time-period for tendering set out in paragraph 2 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. In addition, where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period set out in paragraph 2 to not less than 10 days.

7. Where a procuring entity in Annex 2 or 3 has selected all or a limited number of

qualified suppliers, the time-period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.